

**Green Tree v Teka**

2023 NY Slip Op 31073(U)

February 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 503503/14

Judge: Larry D. Martin

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At an IAS Term, Part FSMP, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9<sup>th</sup> day of February 2023.

P R E S E N T:

HON. LARRY D MARTIN,  
J.S.C.

Index No.: 503503/14 ✓

GREEN TREE,

Plaintiff,

**DECISION AND ORDER**

*-against-*

AUGUSTINE TEKA et al,

Defendant,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

<b>Papers</b>	<b>Numbered</b>
Motion (MS 6) ✓	<u>1</u>
Opposition	<u>2</u>
Reply	<u>3</u>
Motion (MS 7) ✓	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The instant action was commenced on April 23, 2014. All defendants defaulted and the matter proceeded without opposition through the grant of JFS in March 2017. After a sale was noticed for August 8, 2018, Defendant Teka appeared through counsel and filed an order to show seeking to enjoin Plaintiff from proceeding with the scheduled auction and for dismissal pursuant to CPLR 3215[c]. A series of conferences were then held in an effort to assist the parties in reaching an amicable resolution of this litigation<sup>1</sup>.

<sup>1</sup> It appears that Teka's counsel was now representing his successor-in-interest Acquisition Properties NY 23 LLC.

By order dated September 10, 2019, the Honorable Noach Dear – seemingly frustrated with Plaintiff and the representative of the servicer who had already appeared<sup>2</sup> – directed that “Plaintiff, through a personal representative of the trustee (rather than the servicer), must appear for a conference before the Court on 10/29/19 at 10AM (unless the case has been resolved prior to that date.)” Plaintiff moved by OSC to vacate the order or, in the alternative, modify it to allow a representative of the servicer instead of trustee to appear. It also sought to bar Acquisition from appearing and to order Teka’s counsel to withdraw due to conflict of interest. Deficiency was waived as to Teka and Plaintiff requested that he be dropped as a party and the stay of sale be lifted. While Judge Dear did sign the OSC, he struck the stay of enforcement of the September order. As the OSC was made returnable on October 29<sup>th</sup> – the same date as the conference – Plaintiff was still required to produce a representative of the trustee on that date<sup>3</sup>.

On October 29, 2019, the parties<sup>4</sup> entered into a handwritten so-ordered stipulation which withdrew the pending motions. It further states that:

The plaintiff agrees to review Mr. Yakov Winkler [Acquisition’s principal] for a modification and assumption of the subject mortgage loan, with Mr. Winkler to submit an application for same within 2 weeks. Mr. Winkler may apply with his wife for the loan. Assuming the plaintiff can approve Mr. Winkler in compliance with all applicable laws and regulations, the loan terms will be as follows

- 40 year term
- 4.0% interest rate
- \$850,000 principal balance

It is undisputed that Winkler failed to timely submit the required application. However, by order dated January 28, 2020, Judge Dear directed that “Plaintiff to review modification application submitted by Mr. Winkler on 1/24/20 regarding subject mortgage loan, as per order of 10/29/19.” The then-servicer, Caliber, did so and thereafter mailed a letter to Teka indicating that he had been approved for a Trial Period Plan. The Winklers rather than Teka executed the agreement and Acquisition sent the required payments – which Caliber accepted.

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<sup>2</sup> The clerk’s entries for 8/12/19 and 9/10/19 both reflect that a bank representative had been directed to appear.

<sup>3</sup> Or hope that the Court would grant its request to waive the appearance – which was unlikely as Judge Dear had not even been willing to stay the enforcement of the September order pending the determination of Plaintiff’s motion.

<sup>4</sup> The stipulation was negotiated in front of the the Court and was signed by counsel for Plaintiff and counsel for both Teka and Acquisitions. Judge Dear so-ordered it.

By letter dated July 24, 2020, Caliber informed the Winklers that their “request for a loan modification has been approved and will be finalized if Caliber receives the following from you **on or before 08/23/2020**: Original copy of the enclosed Modification Agreement signed by each borrower who signed the original loan documents.” An “Assumption and Release Agreement” –explicitly between Teka (as transferor and borrower), the Winklers (as transferees), Caliber (as servicer), and US Bank as Trustee (as investor) – was also prepared and sent to the Winklers. The Winklers timely returned the modification and assumption agreements – signed by them but not Teka – and the initial payment under the permanent modification. By letter dated September 14, 2020 from Plaintiff’s counsel to counsel for Teka and Acquisition, the recipient was informed that a fully executed assumption agreement had not yet been returned and that if one was not received by September 30, 2020 then, per the terms of the offer, “the modification will not be completed, and Caliber may seek to pursue any and all rights...” It is undisputed that the Winklers were unable to secure Teka’s signature and that Caliber and US Bank never countersigned the agreements. Consequently, the Winklers and Acquisition made no further payments.

On October 23, 2020, Acquisition and the Winklers moved through newly retained counsel for leave to intervene in this action and, thereafter, for an order compelling Plaintiff to execute a modification agreement upon the terms set forth in the October 29, 2019 stipulation. Plaintiff opposed. Efforts to reach an amicable resolution have been unsuccessful<sup>5</sup>.

Acquisition has owned the property since 2018 and it and Winkler have been appearing in this action since that time without seeking to formally intervene. Further, as Acquisition is a success-in-interest to Teka it was able to participate in this action pursuant to CPLR 1018. Thus, though Plaintiff is correct that intervention is untimely and of questionable necessity<sup>6</sup>, the Court will allow it for the limited purpose of addressing the instant motion which is predicated on a so-

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<sup>5</sup> A new modification – with terms less favorable to the Winklers, but no requirement for Teka’s signature – was offered in early 2022 but was not accepted by the Winklers. Recently, the Court held a conference with the parties but – despite some flexibility from both sides – no agreement could be reached.

<sup>6</sup> It is more likely necessary for the Winklers as Acquisition, rather than they, own the property. The LLC and Winkler have participated in this action and the modification interchangeably, however – Acquisition owns the property, the Winklers applied for a modification and signed the agreements in their personal capacity, Acquisition made the payments, etc.

ordered stipulation to which they are parties negotiated before the prior judge handling this action.

Plaintiff and the movants each, in essence, argue that their side performed under the stipulation and subsequent agreement while the opposing party did not. The Winklers assert that they executed all required documents and made all the necessary payments – until Caliber reneged on the agreement. Plaintiff counters that it made all necessary reviews and offered a modification – but that the borrower (Teka) did not execute the trial modification or the assumption agreement as required by the terms of the offer and, thus, the preconditions for the proposed modification were not met.

Having considered the parties submissions and upon a review of the record, the Court finds as follows:

- Winkler was required to submit an application for modification within two weeks of the October 29, 2019 stipulation. While he did not, the delay was excused by the January 28, 2020 order.
- Plaintiff was required by those orders to review Winkler’s application and it did.
- Caliber issued a trial modification to Teka but did not reject the payments made by Acquisition. In fact, it then offered a permanent modification to the Winklers, seemingly acknowledging and accepting that it was they who had signed the TPP and complied with its terms. As such, Plaintiff’s argument that the trial modification was offered to Teka and his failure to sign it was a breach thereunder is unavailing.
- Plaintiff, as required by the stipulation, offered the Winklers a modification upon the agreed upon terms.
- While the cover letter accompanying the permanent modification specifies that the modification agreement must be “signed by each borrower who signed the original loan documents,” the modification itself defines the Winklers –rather than Teka – as “Borrower” and has signature lines with their names rather than his

typed underneath<sup>7</sup>. As such, Teka's signature was not required on the permanent modification and its absence did not provide grounds for Caliber to repudiate the agreement.

- Nowhere in the cover letter or modification agreement does it reference the need for an assumption agreement. Though it was undoubtedly the intention of the parties that the Winklers assume Teka's loan rather than having an additional, new loan be issued to pay it off, the modification agreement was not conditioned on that occurring. Nor has Plaintiff substantiated any legal basis for requiring it.
- It is undisputed that the Winklers nonetheless executed the assumption agreement and timely returned it to Caliber, thereby obligating themselves in Teka's loan (as modified) and ratifying Plaintiff's existing lien. As such, Caliber's unwillingness to honor the modification offer based upon Teka's failure to sign the assumption agreement was unreasonable.
- While Plaintiff accurately notes that the Winklers only made the initial payment under the permanent modification, the September 14, 2020 letter from Plaintiff's counsel made it clear that from Caliber's perspective the Winklers had not complied with the precondition to the modification -- and would not be accorded its benefits unless they returned a copy of the assumption agreement executed by Teka by the end of that month. As they could not and were told that in its absence there was no modification, the Winklers had no reason to submit further payments instead filing the instant motion.
- In light of the foregoing, the Winklers complied with their obligations under the stipulation as modified by Court order and under the permanent modification agreement. Caliber unreasonably repudiated the permanent modification that it undisputedly offered to the Winklers and which has been timely accepted by them. The assumption agreement was not a pre-condition to the agreement and, even if it were, had been signed by the parties assuming the obligation.

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<sup>7</sup> Oddly, it also specifies that "Borrower" has a mortgage loan secured by the property having signed a note and mortgage in 2006 -- all of which are accurate as to Teka, rather than the Winklers. It would seem that there were some draftsmanship issues occasioned by the unusual facts herein.

Upon the above findings, it is

**ORDERED** that the Winklers' and Acquisition's motion is granted; and it is further

**ORDERED** that the Winklers and Acquisition are granted leave to intervene in this action for the limited purpose of addressing the instant motion which is predicated on a so-ordered stipulation negotiated before the prior judge handling this action; and it is further

**ORDERED** that Plaintiff is required to, within thirty days of entry of the instant order, extend to the Winklers a new permanent modification offer upon the terms agreed to in the October 29, 2019 stipulation and offered in the July/August 2020 permanent modification; and it is further

**ORDERED** that Plaintiff's motion for a substitute publication and to amend the caption is denied as moot.

This constitutes the decision and order of the Court.

ENTER:



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Hon. Larry D Martin JSC

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT